Supreme Court, U.S.
FILED

97 1056 DEC 24 1997

OFFICE OF THE CLERK

No. 97-_____

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

NAOMI MARQUEZ,

*Petitioner,*

*v.*

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

RAYMOND J. LAJEUNESSE, JR.*
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

ATTORNEY FOR PETITIONER
**Counsel of Record*

December 24, 1997

BEST AVAILABLE COPY

66 pp

## QUESTIONS PRESENTED

I. Does a union breach its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be "a member of the Union" and pay the periodic dues and initiation fee "uniformly required as a condition of acquiring membership," even though those requirements cannot lawfully be enforced literally as a condition of employment?

II. Does the National Labor Relations Board have exclusive jurisdiction over a performer's claim that a union breached its duty of fair representation by negotiating and maintaining a compulsory unionism provision that misleadingly requires payment of dues as a condition of employment after thirty days of "employment as a performer in the motion picture industry"? If the Board does not have exclusive jurisdiction over this claim, did the union breach its duty of fair representation by negotiating and maintaining that provision?

III. Is the employer an indispensable party to a suit for breach of the duty of fair representation where an employee seeks reformation or expungement of a collective bargaining agreement provision alleged to be facially invalid?

## TABLE OF CONTENTS

*Page*

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

I. The Facts ..... 3

II. Proceedings Below ..... 5

REASONS FOR GRANTING THE WRIT ..... 8

I. There Is a Widespread Conflict Among the Circuits, and Within the NLRB, as to Whether NLRA Section 8(a)(3) Permits Agreements That Purport to Require "Membership" and Payment of Full Dues, Although That Section, as Definitively Interpreted by This Court, Prohibits Enforcement of Those Requirements ..... 8

A. The Conflict ..... 8

B. The Importance of the Issue ..... 12

C. The Court Should Grant This Petition Even If It Grants the *Buzenius* Petition, Because the Facial Validity Issue Is Presented More Completely Here ..... 14



## TABLE OF CONTENTS (CONT.)

*Page*

II. The Court of Appeals' Decision That Ms. Marquez's Unfair Representation Claim Concerning the Facial Validity of the Employment-in-the-Industry Requirement Is Within the NLRB's Exclusive Jurisdiction Conflicts With the Seventh Circuit's Holding That the Federal Courts Have Jurisdiction Over a Claim That a Union Has Misrepresented Employees' Section 8(a)(3) Obligations in a Collective Bargaining Contract ..... 15

III. The Court of Appeals' Dismissal of the Employer Directly Conflicts With the Seventh Circuit's Disposition of the Same Issue in *Wegscheid* and Is a Question That Cannot Be Separated from the Two Other Questions Presented Here ..... 19

CONCLUSION ..... 20

APPENDICES

APPENDIX A: Decision of the United States Court of Appeals for the Ninth Circuit (Aug. 29, 1997) ..... 1a

APPENDIX B: Order of the United States District Court for the Western District of Washington at Seattle (Apr. 16, 1996) ..... 22a

APPENDIX C: National Labor Relations Act, §§ 8(a)(3) and 8(b)(2), 29 U.S.C. §§ 158(a)(3), and 158(b)(2) ..... 35a

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995) | 17 |
| *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991) | 17 |
| *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994) | *passim* |
| *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989) | 17 |
| *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *petition for cert. docketed*, 66 U.S.L.W. ____ (U.S. Dec. 8, 1997) (No. 97-945) | *passim* |
| *Carpenters Local 740*, 238 N.L.R.B. 159 (1978) | 16 |
| *Communications Workers v. Beck*, 487 U.S. 735 (1988) | *passim* |
| *Electronic Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994) | 7, 9 |
| *Electronic Workers Local 444 (Paramax Sys. Corp.)*, 311 N.L.R.B. 1031 (1993), *modified*, 41 F.3d 1532 (D.C. Cir. 1994) | 12, 14 |
| *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324 (1969) | 20 |
| *Iron Workers Local 118*, 257 N.L.R.B. 564 (1981), *enforced per curiam*, 720 F.2d 1031 (9th Cir. 1983) | 15 |
| *Monson Trucking, Inc.*, 324 N.L.R.B. No. 149 (Oct. 31, 1997) | 12 |




## TABLE OF AUTHORITIES (CONT.)


| | Page |
|---|---|
| *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963) | 6, 8, 14 |
| *NLRB v. Iron Workers Local 433*, 767 F.2d 1438 (9th Cir. 1985) | 15 |
| *Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1426 (1997) | 7, 9-11 |
| *Paperworkers Local 1033 v. Buzenius*, No. 97-945 (U.S. docketed Dec. 8, 1997) | 14-15 |
| *Pattern Makers v. NLRB*, 473 U.S. 95 (1985) | 13 |
| *Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225 (D. Minn. 1995) | 10, 19 |
| *Teamsters Local 443 (Connecticut Limousine Serv.)*, 324 N.L.R.B. No.105 (Oct. 2, 1997) | 12 |
| *Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415 (1982) | 16 |
| *Vaca v. Sipes*, 386 U.S. 171 (1967) | 6 |
| *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986 (7th Cir. 1997) | *passim* |
| **Statutory and Rules Provisions** | |
| 28 U.S.C.A. § 1254(1) (West 1993) | 2 |
| 28 U.S.C. § 1331 (1988) | 2 |

TABLE OF AUTHORITIES (CONT.)


*Page*

28 U.S.C. § 1337(a) (1988) ..... 2

Labor Management Relations Act, 1947,
29 U.S.C. § 141(b) (1988) ..... 13
29 U.S.C. § 185 (1988) ..... 2

National Labor Relations Act,
29 U.S.C. § 151 (1988) ..... 13
29 U.S.C. § 152(2) (1988) ..... 3
29 U.S.C. § 152(5) (1988) ..... 3
29 U.S.C. § 157 (1988) ..... 12
29 U.S.C. § 158(a)(3) (1988) ..... *passim*
29 U.S.C. § 158(b)(2) (1988) ..... 2
29 U.S.C. § 159(a) (1988) ..... 2

Sup. Ct. R. 30.1 ..... 2

Fed. R. Civ. P. 19(a)(1) ..... 20

**Other Authorities**

William B. Gould IV, Campaign Finance Reform and the Union Dues Dispute Under *Beck*, Address at the Fall Meeting of the Iowa Chapter of the Industrial Relations Research Ass'n (Oct. 8, 1997), *in* NLRB Release-2259 ..... 13-14

Lab. Rel. Rep. (BNA), *Labor Relations Expediter* 730:319 (Oct. 24, 1994) ..... 13

Lab. Rel. Rep. (BNA), *Labor Relations Expediter* 430:508 (Oct. 23, 1995) ..... 13

Harry H. Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022 (1976) ..... 14


IN THE
**Supreme Court of the United States**
OCTOBER TERM, 1997

---

No. 97-___

---

NAOMI MARQUEZ,

*Petitioner,*

*v.*

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Petitioner Naomi Marquez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on August 29, 1997.

## OPINIONS BELOW

The opinion of the court of appeals, (Appendix ("App.") A, *infra*, 1a), is reported at 124 F.3d 1034. The opinion of the United States District Court for the Western District of Washington, (App. B, *infra*, 22a), is unreported.

## JURISDICTION

The court of appeals entered its judgment on August 29, 1997. On November 6, 1997, Justice O'Connor granted a timely application for an extension of time within which to file this Petition. Justice O'Connor extended the time to and including December 27, 1997, a Saturday, thus extending the time under Supreme Court Rule 30.1 to and including December 29, 1997. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) (West 1993).

## STATUTORY PROVISIONS INVOLVED

This case involves sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 158(a)(3) and 158(b)(2) (1988). Their pertinent text is set out in Appendix C, *infra*, 35a.

## STATEMENT OF THE CASE

This case involves the construction of NLRA section 8(a)(3)'s authorization of compulsory unionism requirements in collective bargaining agreements.

As pertinent to this Petition, this is a civil action for breach of the duty of fair representation under section 9(a) of the Act, 29 U.S.C. § 159(a) (1988), which is an act of Congress regulating commerce. Petitioner Naomi Marquez ("Ms. Marquez"), therefore, contends that the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) (1988) and section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (1988). The district court and court of appeals exercised jurisdiction over some of her unfair representation claims. (*see* App. at 6a-10a, 13a-19a, 28a-30a), but held that others are subject to the



exclusive jurisdiction of the National Labor Relations Board ("Board" or "NLRB"), (*see* App. at 10a-13a, 30a-31a).[1]

### I. The Facts.

Ms. Marquez is a part-time actress. Respondent Lakeside Productions, Inc. ("Lakeside") produced a television series called "Medicine Ball." It is an employer within the meaning of the NLRA, 29 U.S.C. § 152(2) (1988). Respondent Screen Actors Guild, Inc. ("SAG") is a labor organization within the meaning of the NLRA, 29 U.S.C. § 152(5) (1988). It was the exclusive bargaining agent for performers engaged by Lakeside for "Medicine Ball." (App. at 1a-2a.)

In July 1994, Lakeside and SAG entered into a collective bargaining agreement ("CBA") containing a "union security" provision. That provision required every performer previously employed "'as a performer in the motion picture industry'" thirty days or more before beginning employment by Lakeside "to be 'a member of the Union in good standing' and to pay periodic dues and initiation fees." (*Id.* at 2a, 10a, 23a.)[2]

---

[1] The lower courts also dismissed alleged violations of implied terms of the collective bargaining agreement between Respondents. (*See* App. at 19a-21a, 31a-32a.) Ms. Marquez does not here pursue those claims.

[2] The exact language concerning the payment of dues and initiation fees was that the

> Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, . . . if the Producer has reasonable grounds for believing that membership in the Union was denied . . . or . . . terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union . . . .

(Walker Dep., Ex. 7 at 6 (filed Dec. 28, 1995).)

According to SAG's Assistant Hollywood Executive Director of Legal Affairs, (Shapiro Decl. at 1, ¶ 1 (filed Dec. 28, 1995)), SAG knew when it entered into this agreement with Lakeside that it could not lawfully require membership as a condition of employment. SAG also knew that performers had a right under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to pay less than the full dues and initiation fee. (Shapiro Decl. at 2, ¶ 5; Shapiro Dep. at 38-40 (filed Dec. 28, 1995).)

On August 29, 1994, Ms. Marquez auditioned for a small part in an episode of "Medicine Ball." Lakeside offered her the part, and she accepted. However, Lakeside and SAG also had an agreement that required Lakeside to clear all performers with "Station 12," a department of SAG, as to their compliance with the "Union Security" provision before employment began. Lakeside's casting director's office, therefore, called Station 12 to clear Ms. Marquez. (App. at 2a.)

Ms. Marquez was not a SAG member. (*Id.* at 24a.) However, she had worked on one production covered by a SAG agreement for more than a month in 1989. Consequently, Station 12 informed Lakeside, at the least, that Ms. Marquez must pay SAG's initiation fee and dues before she could be cleared to work in "Medicine Ball." (*Id.* at 2a-3a.) "The record contains conflicting evidence with regard to whether SAG representatives impermissibly asserted that Marquez was required to 'join' the union before she would be eligible to work or whether the term used was must 'pay' the union." (*Id.* at 14a.)

When she learned that she must pay SAG before she could work, Ms. Marquez called SAG's Seattle office and asked what it cost to join. She was told that the fee was about $500.00. Ms. Marquez then notified her talent agents that she did not have the necessary money. Lakeside would have paid Ms. Marquez $550.00 for doing the part. However, Lakeside would not have paid her until thirty days after the performance. (*Id.* at 3a.)



Over the next few days, Ms. Marquez's agents tried to solve her problem in several telephone calls to Lakeside, its casting office, and SAG. However, SAG continued to insist that Ms. Marquez pay before being cleared for work and would not permit her to pay after she was paid for acting in "Medicine Ball." (*Id.* at 3a-4a.)[3] SAG also never told Ms. Marquez that she had a right under *Beck* to object and pay only that portion of dues and fees that represents collective bargaining costs. (*Id.* at 17a-18a.)

Ms. Marquez's role was scheduled to be filmed on September 8, 1994. When she did not pay SAG the necessary dues and initiation fee before its deadline on September 7, Lakeside replaced her with another actress. Lakeside filmed the part as scheduled on the 8th. (*Id.* at 4a.)

## II. Proceedings Below.

Ms. Marquez filed her Complaint against SAG and Lakeside in December 1994. It stated two causes of action, breach of the duty of fair representation and breach of implied terms of the collective bargaining agreement. (*Id.* at 4a.) Only the first claim is relevant to this Petition.

Ms. Marquez's first claim for relief is that SAG breached the duty of fair representation it owed her by negotiating and enforcing the compulsory unionism provision of its collective bargaining agreement with Lakeside. She alleges that SAG breached that duty because that provision, on its face and as applied: required union membership, did not provide a thirty-day "grace period" after employment by Lakeside before any obligations to SAG arose, and did not limit an employee's obligation to payment of a fee to defray SAG's costs of collective bargaining,

---

[3] After SAG learned that Ms. Marquez had obtained legal counsel, SAG faxed a letter to Lakeside saying that it did not object to her working. However, this letter arrived after Lakeside had already replaced Ms. Marquez. (App. at 3a-4a.)

contract administration, and grievance adjustment. (*Id.*) This claim also alleges that SAG violated its duty of fair representation by failing to advise Ms. Marquez accurately of her rights and obligations under the NLRA. (*Id.* at 16a.)

The parties filed cross-motions for summary judgment. (*Id.* at 22a.) The district court granted Defendants' motion on all claims, and denied Ms. Marquez's. It ruled that SAG did not breach the duty of fair representation by negotiating and enforcing the requirements of full "membership" and payment of full dues. (*Id.* at 28a-30a.) The court held that Ms. Marquez's unfair representation claims concerning the employment-in-the-industry provision are "preempted by the exclusive jurisdiction of the National Labor Relations Board." (*Id.* at 30a-31a.) The court also rejected the breach of contract claims. (*Id.* at 31a-32a.)

Ms. Marquez timely appealed. (*Id.* at 5a.) The court of appeals reversed the summary judgment as to her claims that SAG's enforcement of the compulsory unionism provision breached the duty of fair representation. The court found that there are disputes over genuine issues of material fact. It also reversed because the district court failed both to address Ms. Marquez's allegation that SAG's failure to notify her of her *Beck* rights breached the duty and to analyze the enforcement claims "under the arbitrariness standard of *Vaca*" *v. Sipes*, 386 U.S. 171 (1967). The court of appeals remanded the case for resolution of those claims. (App. at 13a-19a.)

However, the court of appeals affirmed "the district court's conclusion that SAG did not breach its duty of fair representation by negotiating a CBA which requires covered actors to be members of the union in good standing." (*Id.* at 6a-10a.)

The court acknowledged that, under this Court's decisions in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Beck*, "unions can require no more than payment of initiation fees and dues covering a 'financial core' of services provided to all employees . . . limited to expenditures germane to 'collective



bargaining, contract administration, and grievance adjustment.'" (App. at 7a (quoting *Beck*, 487 U.S. at 745).) Nonetheless, the court decided to follow decisions of two other Circuits that have "held that terms requiring union 'membership' continue to be permissible under federal law." (*Id.* at 8a (citing *Electronic Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), and *Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1426 (1997).) The court recognized that its decision on this issue conflicts with *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), citing *Bloom* as contrary to *Electronic Workers* and *Nielsen*. (*Id.*)

In considering Ms. Marquez's claim that the employment-in-the-industry provision on its face breached the duty of fair representation, the court of appeals conceded that "[d]iscerning a principled distinction between a disguised unfair labor practices claim and a straightforward breach of duty claim is no simple matter." (*Id.* at 12a.) However, the court nevertheless affirmed "the district court's conclusion that Marquez's challenge to the CBA's 30 day term is preempted by the NLRB's exclusive jurisdiction." (*Id.* at 10a-13a).

Finally, in the portion of its opinion "affirm[ing] the district court's dismissal of the breach of contract claim," (*id.* at 19a-21a), the court of appeals rejected Ms. Marquez's contention that "Lakeside is implicated in SAG's alleged failures in fairly representing her" and is "a necessary party to obtain full relief through contract reformation." (*Id.* at 20a.)

## REASONS FOR GRANTING THE WRIT

### I. There Is a Widespread Conflict Among the Circuits, and Within the NLRB, as to Whether NLRA Section 8(a)(3) Permits Agreements That Purport to Require "Membership" and Payment of Full Dues, Although That Section, as Definitively Interpreted by This Court, Prohibits Enforcement of Those Requirements.

#### A. The Conflict.

In *Beck* this Court addressed the "limits § 8(a)(3) places on the ***negotiation*** and enforcement of union-security agreements." 487 U.S. at 745 (emphasis added). The Court reiterated that, "[t]aken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core.'" *Id.* (footnote omitted) (quoting *General Motors*, 373 U.S. at 742). The Court then determined that "this 'financial core' [does not] include[] the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Id.*

It logically follows from *General Motors* and *Beck* that a "union-security" agreement cannot lawfully state conditions of employment—"membership" and payment of full dues—that cannot lawfully be enforced. Yet, surprisingly, the United States Courts of Appeals, and the NLRB, are in deep conflict over the facial validity under the NLRA of compulsory unionism provisions that purport to require full union membership and/or the payment of full union dues as a condition of employment.

In addition to the Ninth Circuit in this case, four other courts of appeals have faced this issue. One, the District of Columbia Circuit, has taken the same position as the Ninth Circuit in this case, indeed, was followed by the Ninth Circuit here. *See*



*Electronic Workers*, 41 F.3d at 1537-39.[4] Two other Circuits, the Sixth and Eighth, take a directly contrary position. *See Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *petition for cert. docketed*, 66 U.S.L.W. ____ (U.S. Dec. 8, 1997) (No. 97-945); *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994). And, there is a conflict on this issue between the decisions of two different panels of a fourth court of appeals, the Seventh Circuit. *Compare Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986 (7th Cir. 1997) *with Nielsen*, 94 F.3d at 1113-15.

The Eight Circuit was the first court of appeals to address this controversial issue. In *Bloom*, it reversed a NLRB-approved settlement agreement requiring a union and employer "to post notices informing employees that they would 'no longer give effect to the provision in [the] contract . . . that requires employees become and remain "members in good standing" as a condition of continued employment unless such provision also provides that employees need only pay the Union's periodic dues and initiation fees.'" 30 F.3d at 1002, 1004 (alteration in original). This notice was "not sufficient to protect [the] employees' . . . right to refrain from union activities," the court ruled, because, under *Beck*, employees "cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees, as the above notice seems to imply." *Id.* at 1004-05.

*Bloom* concluded that "an adequate remedy . . . requires expunction of the offending clause" from the collective bargaining agreement. *Id.* at 1005. *Bloom* thus held, directly contrary to the

---

[4] It is unclear whether the District of Columbia Circuit would take the same position as to compulsory unionism provisions negotiated after *Electronic Workers*. The court there said that the NLRB was "free to reconsider its . . . policy in light of evolving Supreme Court precedent and to conclude that, in the future, unions will be found guilty of a duty-of-fair-representation violation if they adopt 'ambiguous' union-security provisions . . . without apprising employees of their rights under such provisions." 41 F.3d at 1538.

Ninth Circuit in this case, that a compulsory unionism clause that does not say that an employee's only obligation is to pay for collective bargaining costs is "facially invalid," as a district court later applying *Bloom* recognized. *See Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 226-27 (D. Minn. 1995).

The Sixth Circuit was the latest court of appeals to face this issue, and its decision, too, directly conflicts with that of the Ninth Circuit in this case. The collective bargaining agreement in *Buzenius* "require[d] employees to become and remain 'members of the Union in good standing' as a condition of continued employment." 124 F.3d at 788.

"Because the express language of this clause is inconsistent with employees' right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to core representational activities, and because the clause cannot be interpreted without resort to material outside of the CBA," the Sixth Circuit held "that the clause is facially invalid." The court found that "the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." *Id.* at 793.

The Sixth Circuit acknowledged in *Buzenius* that there is a split in the Circuits on this issue, and that this Court "has never squarely faced th[e] issue." *See id.* at 791-92. However, the Sixth Circuit declined to follow the courts that had upheld compulsory unionism provisions purporting to require more than can lawfully be enforced, because to "permit the CBA to say what it cannot literally mean does violence both to the Act's policy of voluntary unionism and to principles of contract interpretation." *Id.* at 792.

The Seventh Circuit's position on this issue is, to say the least, confused. In *Nielsen*, the court "agree[d] with the D.C. Circuit . . . that *Beck* did not, either explicitly or implicitly, call into question the facial validity of union security clauses" that require the payment of union dues without "not[ing] that



employees [are] only obligated to pay for core representational activities." 94 F.3d at 1113-15.

Later, in *Wegscheid*, another panel of the Seventh Circuit indicated that it would have reached a result contrary to *Nielsen* in an appropriate case. *Wegscheid* was an employees' suit alleging that their exclusive bargaining agent breached the duty of fair representation by negotiating and enforcing a compulsory unionism provision that did "not advise the employees of their right (announced in *Beck*) not to join the union and instead to pay only an agency fee." 117 F.3d at 988. The court held that the facial challenge to the provision was "moot," because a settlement of the enforcement count of the complaint gave the plaintiffs "all the relief that *they* need to protect themselves against being misled" by "the objectionable language in the collective bargaining agreement." *Id.* at 990.

However, the *Wegscheid* court also "emphasize[d]," inconsistently with *Nielsen*, that:

> nothing we have said has been intended to suggest that unions and employers have a privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead the employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either ***by itself*** or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating.

117 F.3d at 991 (emphasis added).

This widespread conflict among, and within, the Circuits concerning the facial validity of compulsory unionism provisions requiring full membership and/or payment of full dues is aggra-

vated by a split within the NLRB over the same issue. In *Electronic Workers Local 444 (Paramax Sys. Corp.)*, the Board held that a "union-security clause requiring that employees become and remain 'members of the Union in good standing'" was not facially unlawful. 311 N.L.R.B. 1031, 1033 & n.6 (1993), *petition for review denied in pertinent part*, 41 F.3d 1532 (D.C. Cir. 1994).[5] However, later, in *Teamsters Local 443 (Connecticut Limousine Serv.)*, the Board's current Chairman announced that he "agree[s] with the Sixth Circuit's recent decision in *Buzenius* that union-security clauses containing [language requiring employees to become 'members of the Union in good standing'] are facially invalid." 324 N.L.R.B. No. 105, slip op. at 6 n.1 (Oct. 2, 1997) (Gould, Chairman, dissenting in part) (citation omitted); *accord Monson Trucking, Inc.*, 324 N.L.R.B. No. 149, slip op. at 6 (Oct. 31, 1997) (Gould, Chairman, concurring).

**B. The Importance of the Issue.**

This question manifestly is important, both in principle and in practice, as this Court previously recognized by granting certiorari in cases such as *Beck*.

It is important in principle, because a requirement that employees join or pay full union dues as a condition of employment impairs an employee right explicitly guaranteed in NLRA section 7 and a fundamental congressional policy imbedded in the Act. The employee right impaired is the "right to refrain from" union membership "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)]." 29 U.S.C. § 157 (1988). The fundamental

---

[5] The Board instead found the clause "ambiguous," and concluded that the unions' "failure to clarify the ambiguity constituted a breach of their duty of fair representation." *Electronic Workers Local 444*, 311 N.L.R.B. at 1033 n.6, *petition for review granted & enforcement denied in pertinent part*, 41 F.3d 1532 (D.C. Cir. 1994).



congressional policy impaired is that of protecting employees' "full freedom of association," 29 U.S.C. § 151 (1988), and "the rights of individual employees in their relations with labor organizations," 29 U.S.C. § 141(b) (1988). More particularly, the policy impaired is "the congressional policy of voluntary unionism" that is "implicit in § 8(a)(3)." *Pattern Makers v. NLRB*, 473 U.S. 95, 104-05, 114 (1985); *see Buzenius*, 124 F.3d at 792-93.

Whether NLRA section 8(a)(3) permits agreements that say that "membership" and payment of full dues are required, although that section as definitively interpreted by this Court prohibits enforcement of those requirements, is important in practice for two reasons.

First, the Court's resolution of this question will affect a large number of such agreements. Compulsory unionism agreements are lawful in twenty-nine states and the District of Columbia. *See* Lab. Rel. Rep. (BNA), *Labor Relations Expediter* 730:319 (Oct. 24, 1994). As NLRB Chairman Gould recently reported, "many or most collective bargaining agreements define 'membership,' which is a condition of employment in a union security agreement, as simply membership—and not the payment of periodic dues and initiation fees." William B. Gould IV, Campaign Finance Reform and the Union Dues Dispute Under *Beck*, Address at the Fall Meeting of the Iowa Chapter of the Industrial Relations Research Ass'n (Oct. 8, 1997), *in* NLRB Release-2259, at 3. According to one survey, "[u]nion shop provisions, requiring all employees in the bargaining unit to join the union and maintain membership as a condition of employment, appear in 64 percent of contracts." Lab. Rel. Rep. (BNA), *Labor Relations Expediter* 430:508 (Oct. 23, 1995).

Second, this Court's intervention is necessary to establish conclusively nationwide that employers and unions cannot lawfully mislead employees about their obligations in a "union-security" agreement. As NLRB Chairman Gould also has explained, "[g]enerally speaking, neither workers nor employers understand that 'membership' is what the Supreme Court has

defined it to be in its 1963 *General Motors* holding." Gould, *supra*, at 3; *see Electronic Workers Local 444*, 311 N.L.R.B. at 1037; Harry H. Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1057-58 (1976).

Consequently, as even the Board has admitted, despite its approval of the facial validity of a clause that purports to require "membership," such a clause "is phrased in a way that would lead a reasonable employee to believe that full membership in good standing is required." *Electronic Workers Local 444*, 311 N.L.R.B. at 1040. And, as the Seventh Circuit said in *Wegscheid*, "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union," 117 F.3d at 990, and their right to only "pay dues and fees related to the union's core representational activities." *See Buzenius*, 124 F.3d at 792-93; *Bloom*, 30 F.3d at 1004-05.

### C. The Court Should Grant This Petition Even If It Grants the *Buzenius* Petition, Because the Facial Validity Issue Is Presented More Completely Here.

As noted *supra* p. 9, a petition for certiorari filed by the union in *Buzenius* was docketed on December 8, 1997. That petition presents essentially the same question as the first question presented by this Petition, and cites the same conflict among the Circuits. (*See* Pet. for Cert. at i, 7-8, *Paperworkers Local 1033 v. Buzenius*, No. 97-945 (U.S. docketed Dec. 8, 1997).) However, this case more concretely presents the entire issue of the facial validity of compulsory unionism provisions that do not limit the obligations stated to those that can lawfully be enforced as a condition of employment.

The compulsory unionism provision in *Buzenius* only says that employees "'shall become and remain members of the Union in good standing as a condition of employment'" and "does not define 'member in good standing.'" 124 F.3d at 789. Thus, although the Sixth Circuit held that to be valid a "union-security



clause" must define its requirement as only that employees "pay that portion of dues related to core representational activities," *id.* at 793, this Court could find that clause facially invalid simply because it requires more than the payment of dues and initiation fees without deciding whether the *Beck* rights must be spelled out in the contract. The latter question cannot be avoided in this case, because the provision involved here requires every performer ***both*** "to be 'a member of the Union in good standing' ***and*** to pay periodic dues and initiation fees," (App. at 2a (emphasis added)).

Therefore, the Court should either grant certiorari only in this case, and deny it or summarily affirm in *Buzenius*, or grant certiorari in both cases and consider them together.

## II. The Court of Appeals' Decision That Ms. Marquez's Unfair Representation Claim Concerning the Facial Validity of the Employment-in-the-Industry Requirement Is Within the NLRB's Exclusive Jurisdiction Conflicts With the Seventh Circuit's Holding That the Federal Courts Have Jurisdiction Over a Claim That a Union Has Misrepresented Employees' Section 8(a)(3) Obligations in a Collective Bargaining Contract.

The first proviso to NLRA section 8(a)(3) permits only compulsory unionism clauses that "require as a condition of employment membership . . . on or after the thirtieth day following the beginning of such employment." 29 U.S.C. § 158(a)(3), 1st proviso. Consequently, employees have a statutory, thirty-day grace period with every employment relationship.

An employee "'*who has become delinquent in dues under a contract covering one bargaining unit cannot be denied employment under a contract covering another bargaining unit* without affording him the statutory grace period in which to become current in his or her dues.'" *NLRB v. Iron Workers Local 433*, 767 F.2d 1438, 1442 (9th Cir. 1985) (quoting *Iron Workers Local 118*, 257 N.L.R.B. 564, 566 (1981), *enforced per curiam*, 720 F.2d 1031 (9th Cir. 1983)). Moreover, an employee has a

right to a new grace period when an employer rehires him or her unless the employee was delinquent in dues when previously employed by that employer. *Carpenters Local 740*, 238 N.L.R.B. 159, 160-61 (1978).

The agreement between SAG and Lakeside required "'as a condition of employment [by Lakeside] membership in the Union . . . thirty (30) days after [a person's] first employment as a performer ***in the motion picture industry***.'" (App. at 10a (emphasis altered).) Thus, the agreement failed to inform employees of the separate thirty-day grace period with each employment that is their statutory right, unless they were delinquent in their dues obligations in a prior employment with the same employer.

The Board held a similar clause facially invalid in *Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415 (1982). That clause required all cameramen employed by a producer to join the union "'not later than the 31st day following the beginning of their first employment,'" defined as "'the first such employment for producers under contract with Local 644.'" *Id.* at 1418. The NLRB held that the clause "clearly contravenes the statutory intent of Section 8(a)(3) of the Act," because it does "not provide for the statutory 30-day waiting period before requiring union membership." *Id.* at 1416, 1422. With "respect to any employee who . . . has completed 31 days of employment with any employer subject to its provisions, the provision constitutes a[n unlawful] closed shop and a bar to employment unless that employee continues to remain a member of the Union in good standing." *Id.* at 1422.

The court of appeals held that Ms. Marquez's claim concerning the facial validity of the "CBA's 30 day term is preempted by the NLRB's exclusive jurisdiction" over arguable unfair labor practice claims. (App. at 10a-13a.) Yet, at the same time, by deciding it, the court of appeals recognized that the district court had jurisdiction over Ms. Marquez's parallel claim that SAG breached the duty of fair representation by negotiating a compulsory unionism provision that "requires covered actors to be members of the union in good standing." (*See* App. at 6a-10a.)



The court of appeals correctly exercised jurisdiction over the latter claim, because the duty of fair representation "applies to all union activity, including contract negotiation," *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991); *see Beck*, 487 U.S. at 743. There are no exceptions to the rule that NLRB preemption "does not extend to suits alleging a breach of the duty of fair representation." *See Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-78 (1989).

No principled basis exists for distinguishing the claim the court of appeals adjudicated—that a union breached the duty of fair representation by negotiating a provision that on its face allegedly misleads employees about the ***extent*** of their lawful obligations to the union—from the claim it held to be pre-empted—that a union breached the same duty by negotiating a provision that allegedly misinforms employees as to ***when*** those obligations lawfully begin. *Cf. Abrams v. Communications Workers*, 59 F.3d 1373, 1380-81 (D.C. Cir. 1995) (holding that a union would violate the duty of fair representation if it collected full agency fees before new hires received notice of their right to pay only the *Beck* amount). The court of appeals' decision, thus, is internally inconsistent.

Moreover, through its remand to the district court for further proceedings on those claims, the court of appeals also acknowledged jurisdiction over Ms. Marquez's claims that SAG breached the duty of fair representation by, in its statements outside the collective bargaining agreement, misleading her about her obligations under section 8(a)(3), ***including by enforcing a policy that "required pre-payment of the dues before Marquez would be cleared to perform."*** (*See* App. at 13a-19a, *particularly* 15a-16a (emphasis added).)

In *Wegscheid*, the Seventh Circuit explicitly rejected this artificial distinction between claims that the terms of a collective

bargaining agreement misstate employees' obligations under section 8(a)(3) and claims that a union's statements outside the agreement about those same obligations are misleading:

> If an alleged violation of section 8(a)(3) is litigable in a district court suit challenging statements made outside the collective bargaining agreement as a breach of the union's duty of fair representation, and it is, we cannot think of any reason why it should not be litigable if the statements happen to be contained in the collective bargaining agreement, since the union's duty of fair representation can be violated by union conduct in the negotiation of a collective bargaining agreement, as well as in the enforcement of it.

117 F.3d at 989 (citations omitted). Thus, the court of appeals' decision here on this issue conflicts with the Seventh Circuit's decision in *Wegscheid*.

This question, too, is important. The employment-in-the-industry provision is not unique to SAG's contract with Lakeside. It is part of a standard contract that SAG negotiates with hundreds of motion picture and television producers. (*See* App. at 23a; Shapiro Decl. at 1-2, ¶¶ 2-3; Shapiro Dep. at 22-29.) Thus, thousands of performers are confronted with this provision each time they are employed by a motion picture or television producer who has a contract with SAG.

Moreover, as the Seventh Circuit recognized in *Wegscheid*, the court of appeals' preemption ruling here has a profound practical adverse effect on the ability of performers to challenge this limitation on their fundamental statutory right to freedom of association:

> since the [court of appeals] doesn't question the district court's jurisdiction over . . . the



> count complaining about statements made by the union's [agents] to the plaintiff[], the implication of the [court of appeals'] position is that to challenge both those statements and the language of the union-shop clause the plaintiff[ was] required to proceed in two forums—the district court and the Labor Board—or else surrender [her] judicial claim and proceed exclusively before the Board.

117 F.3d at 989.

Therefore, the Court should grant certiorari on this question as well.

## III. The Court of Appeals' Dismissal of the Employer Directly Conflicts With the Seventh Circuit's Disposition of the Same Issue in *Wegscheid* and Is a Question That Cannot Be Separated from the Two Other Questions Presented Here.

In *Bloom*, the Eighth Circuit held that "an adequate remedy" for a "misleading" and "overly broad" compulsory unionism clause "requires expunction of the offending clause." 30 F.3d at 1004-05; *accord Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 227 (D. Minn. 1995) (in a suit for breach of the duty of fair representation). In *Buzenius*, the Sixth Circuit ruled "that the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." 124 F.3d at 793.

Ms. Marquez here asked for precisely that relief, *i.e.*, an

> injunction which requires SAG and Lakeside to expunge any provisions from their collective bargaining agreements . . . which require employees to be members as a condition of

> their employment, which impose membership or financial obligations upon employees during the first 30 days of their employment, and which require employees after the expiration of 30 days of employment to pay amounts which exceed a pro rata share of SAG's costs of "collective bargaining, contract administration, and grievance adjustment."

(Compl. at 7, ¶ IV.) Clearly, any such reformation of the contract cannot be compelled if Lakeside is not a party to this case.

Nonetheless, the court of appeals dismissed Lakeside, holding that Lakeside is not "a necessary party to obtain full relief through contract reformation, as the facial challenge to the CBA does not survive." (App. at 20a.) The Seventh Circuit reached precisely the opposite conclusion in *Wegscheid*, ruling that, even though the plaintiffs' facial claims were moot there, the employer "should not have been dismissed from the case, since the plaintiffs were asking the court to order a change in a contract to which [it] is a party." 117 F.3d at 988 (citing Fed. R. Civ. P. 19(a)(1)). That ruling is consistent with this Court's holding in *Glover v. St. Louis-San Francisco Ry.* that "federal courts may . . . properly exercise jurisdiction over ***both*** the union and the railroad" in a suit for breach of the duty of fair representation, if "the employer is made a party to insure complete and meaningful relief." 393 U.S. 324, 329 (1969) (emphasis added).

Because Lakeside is an indispensable party for the relief that would be appropriate should Ms. Marquez prevail on either of the first two questions presented, the Court should grant certiorari on this question as well.

## CONCLUSION

This case presents issues that have great significance to the respective rights of individual employees, unions, and employers under the NLRA. There are direct conflicts between the decisions



of different courts of appeals on all questions presented, including a widespread conflict among several courts of appeals on the question of the facial validity of compulsory unionism provisions that purport to require employee obligations that cannot lawfully be enforced. Therefore, the Court should grant this Petition on all questions presented, and, if a writ also is issued in *Buzenius*, set the cases for argument consecutively or consolidate and hear them together.

Respectfully submitted,

RAYMOND J LAJEUNESSE, JR.*
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

ATTORNEY FOR PETITIONER
**Counsel of Record*

December 24, 1997

# APPENDICES

**APPENDIX A**

---

**DECISION OF THE**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**August 29, 1997**

---

**[124 F.3d 1034]**
**Naomi MARQUEZ, Plaintiff-Appellant,**
**v.**
**SCREEN ACTORS GUILD, INC., and Lakeside Productions, Inc., a foreign corporation, Defendants-Appellees.**

**No. 96-35566.**

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 7, 1997.

Decided Aug. 29, 1997.

* * *

**[1035]**Before: REAVLEY,* O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether the Screen Actors Guild breached its duty of fair representation when it refused to clear a part-time actress for work because she could not pre-pay full union dues.

**[1036]**I

Naomi Marquez is a part-time actress, represented by agents Scott Thompson and Ingrid Fuhriman at the Thompson

---

* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Media Talent agency. Lakeside Productions ("Lakeside") is the producer of a television series called "Medicine Ball," and is an employer within the meaning of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(2) (1988). Heidi Walker of Dixon/Walker Casting ("Dixon/Walker"), was hired by Lakeside to serve as the casting director for the "Medicine Ball" project.

The Screen Actors Guild ("SAG" or "the union") is a labor organization within the meaning of the NLRA. *See* 29 U.S.C. § 152(5). SAG was the exclusive bargaining agent for performers working for Lakeside on the "Medicine Ball" series.

Lakeside and SAG entered into a collective bargaining agreement ("CBA") which included a union security term providing that any actor who had previously worked more than 30 days in the motion picture industry was required to be "a member of the Union in good standing" and to pay periodic dues and initiation fees. To assure compliance with the CBA, Lakeside was required to call in the names of all performers for clearance by "Station 12," a regional division of SAG. SAG then informed the producers of each employee's dues obligations to the union and whether or not they were cleared to work in the performance.

On August 29, 1994, Marquez successfully auditioned for a small role in Lakeside's "Medicine Ball" series, and accepted the offer. Dixon/Walker, as the casting director and in keeping with its normal procedure, called in Marquez's name for clearance with Station 12. Marquez had previously worked for more than 30 days in the motion picture industry: five years earlier, in 1989, she worked more than 30 days on a movie that was covered by a SAG agreement. This 1989 employment triggered the union security term in the CBA, and Marquez was now required by the CBA to pay union initiation fees and dues to SAG.



There is a dispute over whether Station 12 informed Dixon/Walker that Marquez "must join" SAG, or whether the words used were "must pay" SAG, before she would be eligible to work in the production. Regardless of the term used, Marquez understood that she was required to pay SAG before she would be eligible to work. She called the Seattle SAG office to inquire into the cost of joining the union, and was told that the fee was about $500. She would receive $550 for her work in the production, to be paid 30 days after her performance. Marquez told her agents that she could not afford to pay the fee before being paid for the job. Her agents, Thompson and Fuhriman, said they would attempt to work something out.

Ingrid Fuhriman made several phone calls on Marquez's behalf to Lakeside, Dixon/Walker and SAG over the next few days. She called SAG headquarters in Los Angeles to try to work out an arrangement. Fuhriman asked whether Marquez could pay the fees after being paid by Lakeside, as she could not afford to pay ahead of time. An unidentified SAG employee in the membership department said that this would not be possible, and that Marquez must pay before being cleared for work. It was also suggested that if Marquez could not pay in advance she could have up to 14 days after filming to pay. The SAG employee said that it would not be possible to wait the 30 days that it would take to be paid for the acting job, nor to agree simply to sign over her check to SAG. Fuhriman next spoke with Vicki Shapiro, SAG's legal counsel, who verified this information. Shapiro further testified that Fuhriman did not mention Marquez by name, nor say that Marquez objected to joining the union.

Marquez then contacted Hugh Reilly at the National Right to Work Legal Defense Foundation. He drafted a letter explaining that, under federal law, Marquez could not be required to join a union as a condition of employment, that SAG could only require that she pay a pro-rated share for services provided to

all workers,[1] and that she was entitled to a 30-day grace period before any [1037]fees could be required. A draft of this letter was sent to Thompson Media on September 2nd, and was later faxed to Dixon/Walker on September 6. Lakeside also received a copy of the letter, which it faxed to SAG on September 7.

September 7th was also the day before Marquez was to perform in the production, and the deadline established by Station 12 for Marquez to pay the union dues. As she had not paid by the deadline, Lakeside hired another performer to replace her, and filming took place on the 8th. That same day, Vicki Shapiro, SAG's legal counsel, faxed a letter to Lakeside saying that it had no objection to Marquez working in the production. This letter arrived too late to be of assistance to Marquez, who lost the job.

Marquez filed suit against SAG and Lakeside in December, 1994. First, Marquez claimed that SAG breached its duty of fair representation owed to all workers covered by the agreement when it negotiated and enforced a CBA requiring more from employees than federal law permitted by: (1) requiring membership in the union; (2) demanding full payment of union dues of Marquez, rather than informing her of her right to pay a lesser "core" amount; and (3) and by failing to grant a 30 day grace period for each period of employment.

Secondly, she claimed that SAG and Lakeside breached "implied terms" from federal law which are implicitly part of all CBAs. Lakeside and SAG breached these terms, according to Marquez, in negotiating and enforcing the union security term. She requested declaratory, injunctive, and monetary relief under both claims, as well as attorneys fees. The district court granted

---

[1] In its notice to fee-paying non-members, SAG informs those who decline union membership that they must pay 97.2% of the full union dues to cover representational services.



summary judgment to the defendants and Marquez filed this timely appeal.

II

As an exclusive bargaining representative of all employees in a bargaining unit, a union has a "statutory duty fairly to represent all of those employees" in the negotiation and enforcement of a collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967). This duty is enforceable by courts, even if the alleged breach arguably could be considered an unfair labor practice under NLRA § 8(b)(1)(A) and therefore otherwise under the exclusive jurisdiction of the NLRB. *See Communications Workers of America v. Beck*, 487 U.S. 735, 743, 108 S.Ct. 2641, 2647, 101 L.Ed.2d 634 (1988).

The duty of fair representation has been likened to a fiduciary duty owed by the union to all employees "to represent them adequately as well as honestly and in good faith." *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 75, 111 S.Ct. 1127, 1133, 113 L.Ed.2d 51 (1991). The duty applies to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." *Beck*, 487 U.S. at 743, 108 S.Ct. at 2647 (internal citation omitted).

A union breaches the duty of fair representation when "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190, 87 S.Ct. at 916. The Supreme Court has enunciated a highly deferential standard for reviewing the substantive results of a union's negotiation efforts, which should be evaluated "in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." *O'Neill*, 499 U.S. at 78, 111 S.Ct. at 1135.

> [T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness' ... that it is wholly 'irrational' or 'arbitrary.'

*Id.* (internal citation omitted).

Marquez argues that SAG breached its duty of fair representation by negotiating and entering into a CBA with two unlawful terms: the union security clause and a 30-day term. Each contention will be dealt with in turn.

A

SAG and Lakeside entered into a collective bargaining agreement ("CBA") with a union security term which provides: "Every **[1038]**performer hereafter employed by any Producer ... shall be a member of the Union in good standing."[2] Marquez contends that the union acted arbitrarily and in bad faith in negotiating this term because unions may not legally require full union membership as a condition of employment. We disagree.

The NLRA by its very terms allows the inclusion of a union security term requiring union "membership." At the same time,

---

[2] During the pendency of this suit, the parties amended the CBA to read as follows:

> As defined and applied in this section, the term 'member of the Union in good standing' means a person who offers to pay (and if the Union accepts the offer, pays) union initiation fees and dues as financial obligations in accordance with the requirements of the National Labor Relations Act.

As Marquez's alleged injury was caused by the enforcement of the agreement before its amendment, we will construe the CBA as it existed at the time giving rise to the cause of action. *See Teachers Local 1 v. Hudson*, 475 U.S. 292, 305 n. 14, 106 S.Ct. 1066, 89 L.Ed. 232 (1986).



the concept of "membership" in CBAs has become a term of art: unions can require no more than payment of initiation fees and dues covering a "financial core" of services provided to all employees. *See NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1458, 10 L.Ed.2d 670 (1963). This core amount is limited to expenditures germane to "collective bargaining, contract administration, and grievance adjustment." *Beck*, 487 U.S. at 745, 108 S.Ct. at 2648.

First, § 8(a)(3) of the NLRA provides that an employer may not "encourage or discourage membership in any labor organization; Provided that nothing shall ... preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment...." 29 U.S.C. § 158(a)(3). The second proviso to § 8(a)(3) suggests that payment of "uniformly required" dues and fees will satisfy the membership requirement. *Id.* The Act further provides that no union may attempt to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)...." 29 U.S.C. § 158(b)(2).

The Supreme Court has interpreted these provisions as an attempt by Congress to avoid the twin evils of compulsory unionism and employee free-riders, both of which are inherent risks of an exclusive bargaining arrangement. *See Beck*, 487 U.S. at 749, 108 S.Ct. at 2650. Section 8 strikes a balance with the following compromise: unions cannot force objectors to join as a condition of employment, but they can require that objectors pay for those core services which benefit all employees. *Id.*

> Taken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core' ... [support-

ing] collective bargaining, contract administration, and grievance adjustment.

*Id.* at 745, 108 S.Ct. at 2648.

Marquez reasons that SAG breached the duty of fair representation by negotiating a CBA which continued to purport to require full union membership after *Beck*. She contends that the CBA's term is misleading to employees who do not know that federal law has limited their mandatory union obligation to the "financial core" outlined in *Beck*. Because SAG must have known that *Beck* does not permit mandatory union membership beyond the payment of "core" fees, its inclusion of the membership requirement in the CBA was an "arbitrary" or "bad faith" breach of the duty of fair representation according to Marquez.

Two of our sister Circuits have recently considered and rejected claims from plaintiffs who, like Marquez, wished to require unions to re-phrase their CBA's to reflect this "financial core" limitation on the concept of "membership." The courts held that terms requiring union "membership" continue to be permissible under federal law. *See International Union Electronic, Electrical, Salaried, Machine and Furniture Workers v. NLRB*, ("*IUE* ") 41 F.3d 1532 (D.C.Cir.1994); *Nielsen v. International Association of Machinists*, 94 F.3d 1107 (7th Cir.1996), [1039]*cert. denied*, ___ U.S. ___, 117 S.Ct. 1426, 137 L.Ed.2d 536 (1997); *but see Bloom v. NLRB*, 30 F.3d 1001, 1005 (8th Cir.1994) ("Because the overly broad union security clause was unlawfully interpreted and applied, an adequate remedy requires expunction of the offending clause.").

In *IUE*, the D.C. Circuit reversed a determination by the NLRB that a union acted in "bad faith" by negotiating a union security agreement requiring employees to "join the union" and "remain members of the Union in good standing as a term and condition of employment." *IUE*, 41 F.3d at 1535. The Board



held that this language had become ambiguous because of legal glosses on the term, and could mislead employees about the extent of their obligations to the union. By maintaining this provision without explaining that the union could demand no more than the payment of "core" dues and fees, the Board held, the union breached its duty of fair representation. *Id.* at 1537.

The D.C. Circuit reversed, holding that there was no showing of a bad faith breach of the duty of fair representation under the *Vaca* standard because identical union security provisions had never previously been found to be "ambiguous" or misleading. A "bad faith" violation requires a showing of "fraud, deceitful or dishonest action." *IUE*, 41 F.3d at 1537. No such showing was possible in IUE because the NLRB had always permitted such membership terms in the past.

Marquez argues that *IUE* only ruled that there was no "bad faith" violation of the fair representation duty, while leaving open the question of whether such terms may constitute breach of the duty under the "arbitrary" prong of *Vaca*. However, the Seventh Circuit has rejected this claim in adopting the approach of *IUE*:

> We agree with the D.C. Circuit and the NLRB that *Beck* did not, either explicitly or implicitly, call into question the facial validity of union security clauses.... In this case, as in *IUE* there is no evidence whatever that the union acted arbitrarily, discriminatorily, or in bad faith, within the meaning of *Vaca* and *O'Neill* when it negotiated the agency shop clause....[3]

---

[3] The CBA clause at issue in *Nielsen* provided:

> As a condition of continued employment, all employees ... shall either become a member of the Union and pay dues thereto, or ... shall pay an amount equal to the Union's initiation fee and ... dues.

*Nielsen*, 94 F.3d at 1115.

We affirm the district court's conclusion that SAG did not breach its duty of fair representation by negotiating a CBA which requires covered actors to be members of the union in good standing.

B

The CBA between Lakeside and SAG also includes the following provision:

> B. The foregoing subsection A., requiring as a condition of employment membership in the Union, shall not apply until on or after the thirtieth day following the beginning of such employment ...; the Union and the Producers interpret this sentence to mean that *membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry*. (emphasis added)

Marquez argues that this term is a misapplication of the first proviso of NLRA § 8(a)(3). That section provides:

> [N]othing ... shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment *membership therein on or after the thirtieth day following the beginning of such employment* ....

29 U.S.C. § 158(a)(3) (emphasis added).

---

*Nielsen*, 94 F.3d at 1109-10. The union also had procedures to notify employees of their rights under *Beck* to pay only the core financial amounts. *Id.*



Marquez contends that the statute's term "such employment" is interpreted by the Board to mean each separate employment relationship, *see Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415, 1422, 1982 WL 24170 (1982), and that SAG therefore breached its duty of fair representation by negotiat**[1040]**ing a term that required more than the statute permits. SAG counters that because of the unique circumstances of multiple short term jobs in the motion picture industry, "such employment" can legitimately be interpreted to mean "employment in the industry."

The district court held that this claim is preempted by the NLRA because it is nothing other than an unfair labor practices claim, depending entirely on the question of the proper interpretation of § 8(a)(3). It is therefore within the primary jurisdiction of the NLRB. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 778, 3 L.Ed.2d 775 (1959). Marquez counters that she is not making a direct allegation that SAG engaged in an unfair labor practice within the meaning of the NLRA. Rather she argues that inclusion of the 30-day term in the CBA violates the union's judicially enforceable duty of fair representation because it requires more of employees than is permissible under authoritative interpretations of the statute. Under this approach the question would be within the jurisdiction of federal courts to enforce like any other fair representation claim.

Marquez is correct that federal courts will exercise jurisdiction over claims alleging breach of a union's duty of fair representation even if those claims also involve an arguable violation of § 8(a)(3). *See Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 75, 110 S.Ct. 424, 429, 107 L.Ed.2d 388 (1989) (that "a breach of duty of fair representation might also be an unfair practice is ... not enough to deprive a federal court of jurisdiction over the fair representation claim"). In *Beck*, for instance, the Supreme Court found that jurisdiction was proper over a claim alleging that the union breached its duty of fair

representation by requiring non-members to contribute to services to which the employees objected. This fair representation claim was not preempted even though it involved an interpretation of the proper scope of § 8(a)(3). *See Beck*, 487 U.S. at 743, 108 S.Ct. at 2647.

However, the *Beck* court specifically warned federal courts not to be hoodwinked by a plaintiff's attempt to side-step the exclusive jurisdiction of the NLRB over unfair labor practices claims in this manner.

> Federal courts may resolve unfair labor practice questions that 'emerge as collateral issues in suits brought under independent federal remedies' ... [such as] the judicially implied duty of fair representation.... Employees, of course may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation.

*Id.* (internal citations omitted).

The court went on to explain that the employees' fair representation claim in *Beck* was not a disguised unfair practices claim, and that the "necessity of deciding the scope of § 8(a)(3) arises because [the union] seek[s] to defend themselves on the ground that the statute authorizes precisely this type of agreement." *Id.*

Discerning a principled distinction between a disguised unfair labor practices claim and a straightforward breach of duty claim is no simple matter, as any unfair labor practice can also be styled as a breach of the duty of fair representation. However, we agree with the district court that Marquez's challenge to the CBA's 30-day provision is preempted. Unlike the question presented in *Beck*, the challenge to SAG's interpretation of the 30-day grace period required by the NLRA does not raise the § 8(a)(3) claim as a collateral issue in an otherwise straightforward fair representation claim. Her claim rests squarely upon the proper interpretation of § 8(a)(3): if the CBA's 30-day term is proper under § 8(a)(3) then SAG wins; if not Marquez prevails.



We have previously explained our traditional deference to the NLRB in interpreting the requirements of the NLRA to unique fact situations:

> The desire to protect the primary jurisdiction of the NLRB flows from the need to maintain centralized administration of the NLRA by a specialized agency. Labor law involves many difficult questions of policy best left to the agency that has the expertise to solve them.... [T]he risk of interference with the NLRB's central ad**[1041]**ministration is great where the controversy presented to the court is one 'which could have been, but was not presented to the Labor Board.'

*Burke v. French Equipment Rental, Inc.*, 687 F.2d 307, 311 (9th Cir.1982) (internal citation omitted). The factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry is precisely the kind of question that we think the NLRB was designed to address.

We affirm the district court's conclusion that Marquez's challenge to the CBA's 30 day term is preempted by the NLRB's exclusive jurisdiction.

III

The district court also granted summary judgment to SAG on Marquez's claim alleging breach of the duty of fair representation in the enforcement of the union security term. Although there were some discrepancies in the record, the court held that no reasonable jury would conclude that SAG's actions amount-

ed to a bad faith attempt to enforce the CBA beyond its legal limits.

In reviewing a summary judgment order we must "determine, viewing the facts in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir.1995).

A

The record contains conflicting evidence with regard to whether SAG representatives impermissibly asserted that Marquez was required to "join" the union before she would be eligible to work or whether the term used was must "pay" the union. The contemporaneous typed notes by a Dixon/Walker casting assistant indicate that the Station 12 employee listed Marquez's status as "must join," and her talent agents who spoke with the casting agency said that this was the term used.

Later typed notes and a Station 12 written confirmation letter used the term "must pay," and SAG and Dixon/Walker casting employees testified that this was the term used. There was also evidence of some confusion over the term used because this was a period of transition between the "must join" and "must pay" terminology. SAG further argues that because Marquez's talent agents may have known that nothing more than payment of the fees was required, Marquez should have been on notice that she was not required to actually "join" the union. Even were this so, SAG's duty of fair representation runs directly to Marquez as an employee covered by an exclusive bargaining arrangement. If SAG asserted that Marquez was required to join the union as a condition of employment this would, of course, implicate its duty of fair representation owed to her.



The record is also unclear as to whether SAG policy required pre-payment of the dues before Marquez would be cleared to perform in the production. Station 12 employees repeatedly warned that Marquez was required to pay the dues and fees before she would be cleared. When Marquez's agent contacted SAG headquarters and outlined the impossibility of pre-payment, she was told that SAG would allow no more than 14 days for payment of the full amount. When challenged by a lawyer's letter threatening legal action, SAG faxed a letter to Lakeside on the day Marquez's replacement was filmed in her part, stating that SAG had no objection to Marquez performing in the production.

Obviously, each of these positions is mutually exclusive: either Marquez was required by SAG policy to pay before she was allowed to work as Station 12 suggested, or she was required to promise to pay within two weeks of working (though her request for 30 days to pay was specifically refused), or SAG had no objection to Marquez working in the production and would arrange for payment later. If the policy was actually to permit actors to work on SAG-covered jobs while working out a payment plan later, then SAG may have breached its duty by misinforming Marquez and the production staff that she would not be cleared to work on the project until she paid the union in full. If the policy was in **[1042]**fact to require full payment before permitting an actor to work, this policy may also implicate the duty of fair representation under the arbitrariness prong of *Vaca*.

Finally, it is unclear from this record whether SAG gave Marquez notice that she would be obligated to pay some fees and dues when she had her first contact with the union. Marquez testified at a deposition that when she worked on a SAG-covered job in 1989 she had been required to fill in various union forms and was told that she was not obligated to pay any SAG fees as a condition of employment in that role. The record does not reflect whether she received notice at that time

of SAG's interpretation of the 30-day rule, or that the next time she wished to work on a SAG-covered job she would be required to pay fees once she had worked "in the industry" more than thirty days.

As these genuine issues of material fact remain to be resolved with regard to SAG's enforcement of the CBA, we reverse the district court's summary judgment order over Marquez's claim that SAG breached its duty of fair representation in enforcing the CBA.

B

The district court does not appear to have considered Marquez's allegations that SAG's failure to notify all employees of their right to pay the lesser "core" fees under *Beck* violates the duty of fair representation. Those Circuits which have upheld the facial validity of union security clauses have suggested that, because a CBA's membership requirement may be misleading, the unions have a duty to inform workers of the "core" payment option. *See, e.g., Abrams v. Communication Workers of America*, 59 F.3d 1373, 1379 (D.C.Cir.1995) (rejecting facial challenge to union security term, but requiring adequate notice of right to pay "core" fees and to challenge the "core" amount); *Nielsen* 94 F.3d at 1114 (problems might arise only if a union were to fail to provide appropriate notice to employees); *Id.* at 1115 (rejecting claim of unfair enforcement because notice of right to object was adequate and procedure for objecting was fair).

We have previously held that unions have a duty to inform workers of the steps they must take to retain their jobs before the union may request that an employer terminate their employment. See, *e.g., Sheet Metal Workers' Local 355 v. NLRB*, 716 F.2d 1249, 1254 (9th Cir.1983) (union has duty of to give employee clear notice of steps necessary to protect job tenure); *NLRB v. Teamsters Local 291*; 633 F.2d 1295, 1298-99 (9th



Cir.1980) (union must give notice to employee before requesting discharge even if employee knew of his obligation to pay dues and the consequences of failing to pay). When an employee's job is at risk for failure to meet union dues obligations, the union "must deal fairly" with the employee. *Sheet Metal Workers'*, 716 F.2d at 1254 (quoting *Macaulay Foundry Co. v. NLRB*, 553 F.2d 1198, 1201 (9th Cir.1977)).

We think this duty may well include a requirement to inform workers of the minimal requirements with respect to the payment of only "core" dues and fees under *Beck*. The alternative position would mean that unions may demand more than federal law requires, while waiting for uninformed employees to request the "core" payment option. Surely the unspoken hope that employees will pay the full amount without question, which is the only plausible reason for failing to give such notice, does not constitute treating all employees fairly.

The only record facts relating to notice of employee's rights to pay less than 100% of the union's dues appear in an affidavit from Leonard Chassman, Hollywood Executive Director of SAG. He states that SAG "sends notices to all performers who notify SAG that they decline membership, either by resigning or refusing to join in the first instance, of their rights under federal labor law." Attached to the affidavit is a copy of the notice: it informs objectors that 1) they must pay dues if they intend to perform for employers who are signatories to their CBA; 2) they have the right to object to payment of dues for non-representational ("non-core") activities; 3) the representational ("core") activities dues are 97.2% of Guild dues.

SAG claims that it has an adequate system for "notifying all nonmember employees who **[1043]**make payments pursuant to its union security clause of their right to object and pay only the collective bargaining portion of the agency fee." The union

explains that Marquez never received this notice because SAG was never told that Marquez did not wish to join the union.[4]

We remand this question to the district court to consider whether SAG's apparent lack of notice to all employees of the "core" payment option, in conjunction with the Marquez's other allegations, constituted an arbitrary breach of the duty of fair representation "in light of the factual and legal landscape at the time of the union's actions," *O'Neill*, 499 U.S. at 67, 111 S.Ct. at 1129.

C

Finally, Marquez argues that the district court erred in failing to consider her claim that SAG breached its duty under the arbitrary prong of *Vaca* in its enforcement of the CBA. The district court's order does not address the arbitrariness analysis, although Marquez did include this argument in her opposition to summary judgment.

In explaining *Vaca*'s arbitrariness standard we have held that even unintentional acts and omissions may constitute a breach of the duty of fair representation. "[U]nintentional acts or omissions by union officials may be arbitrary if [1] they reflect reckless disregard for the rights of an individual employee, ... [2] they severely prejudice the injured employee, ... and [3] the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case." *Robesky v. Qantas*

---

[4] We find no merit in SAG's alternative claim that Marquez had not accepted Lakeside's offer of employment. The record is clear that all understood that she had accepted the role and that only SAG's refusal to clear her for work stood in the way of her performance.



*Empire Airways Ltd.* 573 F.2d 1082, 1090 (9th Cir.1978) (internal citations omitted).

There are several related factual allegations involved in Marquez's claim that SAG acted arbitrarily in enforcing the union security term. These allegations should be considered together to determine whether there was a breach under the totality of circumstances. *See Castenada v. Dura-Vent*, 648 F.2d 612, 618 (9th Cir.1981) (instructing district court on remand to consider the totality of union's acts in determining whether it breached duty of fair representation).

While SAG argues that Marquez will not be able to satisfy *Robesky*'s three-part test, we nevertheless remand this question to the district court to consider it in conjunction with the other factual allegations in this claim. *See Robesky*, 573 F.2d at 1091 (remanding for district court to consider claim that union acts satisfied test for arbitrary breach of duty of fair representation).

D

To summarize, we reverse the district court's summary judgment order as to Marquez's claim that SAG's enforcement of the CBA breached the duty of fair representation because disputes over genuine issues of material fact preclude summary judgment, and because the court failed both to address a portion of Marquez's allegations in considering the enforcement claim, and to conduct an analysis of Marquez's breach claim under the arbitrariness standard of *Vaca*. We remand for resolution of these matters.

IV

Marquez's second claim for relief against Lakeside and SAG is brought under § 301 and alleges that the defendants together breached implied federal law terms of the CBA when Lakeside replaced Marquez because SAG had not cleared her

to work on the production. This claim alleges: (1) that the NLRA does not permit CBAs to require membership obligations, payment of dues for the first 30 days of employment, or payments in excess of core amounts; and (2) SAG and Lakeside violated these implied-in-law rights of employees because they "maintain and enforce their [CBA's] against employees ... which on their face and as applied violate" the NLRA's limitations.

We have already concluded that the union security term does not violate federal law and that the CBA's interpretation of the [1044]NLRA's 30-day grace period is within the exclusive jurisdiction of the NLRB. This reasoning applies with equal force to Marquez's contention that Lakeside and SAG breached implied terms of the CBA by maintaining a CBA with these provisions.

The only remaining claim against SAG is the alleged breach of the duty of fair representation in its enforcement of the CBA. Marquez argues that because Lakeside is "implicated" in SAG's allegedly wrongful conduct, Lakeside should also be held liable for SAG's breach of the duty of fair representation. We disagree.

Marquez argues that Lakeside is implicated in SAG's alleged failures in fairly representing her because it "aided and abetted" SAG by hiring a casting director who cleared employees through Station 12, and by replacing her in the role when SAG did not clear her for work. She does not claim, however, that Lakeside had any affirmative duties to inform Marquez of her rights with regard to paying union dues or that Lakeside impermissibly sought to force her to join the union. *See Nielsen*, 94 F.3d at 1117 (dismissing employer from § 301 suit claiming breach of union's duty of fair representation in negotiation and enforcement of union security term). Nor is Lakeside a necessary party to obtain full relief through contract reformation, as the facial challenge to the CBA does not survive.



We therefore affirm the district court's dismissal of the breach of contract claim.[5]

V

We affirm the district court's order of summary judgment as to Marquez's claim that SAG breached its duty of fair representation by negotiating the CBA's union security term. We also affirm the court's dismissal of Marquez's second claim alleging that SAG and Lakeside breached implied terms of the CBA. However, we reverse summary judgment on Marquez's claim that SAG arbitrarily or in bad faith breached its duty of fair representation in the enforcement of the CBA, and remand for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

**Each party to pay its own cost.**

---

[5] Because we affirm summary judgment on Marquez's second claim, we do not reach the question of whether Marquez was required to exhaust contractual remedies before bringing this claim.

**APPENDIX B**

---

**ORDER OF THE UNITED STATES**

**DISTRICT COURT FOR THE**

**WESTERN DISTRICT OF WASHINGTON**

**AT SEATTLE**

**April 16, 1996**

---

**[Clerk's Stamp Omitted in Printing]**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | | |
|---|---|---|
| NAOMI MARQUEZ, | ) | |
| | ) | |
| Plaintiff, | ) | NO. C94-1831R |
| | ) | |
| v. | ) | ORDER GRANTING |
| | ) | DEFENDANTS' |
| SCREEN ACTORS GUILD and | ) | MOTION FOR SUM- |
| LAKESIDE PRODUCTIONS, | ) | MARY JUDGMENT |
| INC., a foreign corporation, | ) | AND DENYING |
| | ) | PLAINTIFF'S MO- |
| Defendants. | ) | TION FOR SUM- |
| | ) | MARY JUDGMENT |

THIS MATTER comes before the court on the parties' cross-motions for summary judgment. Having considered all of the documents filed in support and in opposition to the motions, and being fully advised, the court finds and rules as follows:

## I. BACKGROUND

The following facts are undisputed by the parties: On August 29, 1994, plaintiff Naomi Marquez ("Marquez") auditioned for a one-line television acting role for an episode of a television series "Medicine Ball" produced by defendant Lakeside Productions, Inc. ("Lakeside"). The terms and conditions of employment for performers employed by Lakeside were governed by a collective bargaining agreement entered into by Lakeside and the Screen Actors Guild, Inc. ("SAG" or the "Union"), discussed more below.

SAG is a labor organization that represents actors and actresses and others in the motion picture and television industry. In July 1994 Lakeside became a signatory to the SAG 1992 Memorandum of Agreement between Independent Motion Picture and Television Producers, binding Lakeside to several SAG collective bargaining agreements. The Memorandum stated that the SAG Codified Basic Agreement of 1989 for Independent Producers, the SAG Television Agreement of 1989 for Independent Producers and the 1992 Memorandum of Understanding would govern the terms and working conditions of performers employed by Lakeside. The agreements are referred to herein as the Collective Bargaining Agreement (the "CBA").

The CBA contains a "union security" provision that states that a performer who works under the agreement shall be a "member of the Union in good standing." Subpart 2A, CBA. In addition, the CBA contains a provision stating that the union security provision

> shall not apply until on or after the thirtieth day following the beginning of such employment . . . and the Producers shall interpret this sentence to mean that membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry; . . .

Subpart 2B, CBA.

Marquez's talent agency, Thompson Media Talent ("TMT") arranged with Dixon Walker Casting for Marquez to audition on August 29, 1994 for a one-line role in Lakeside's production of the television series "Medicine Ball." On August 31, 1994, Marquez was informed by her agent at TMT, Ingrid Fuhriman, that Lakeside wanted Marquez for the role and that filming would occur on September 8, 1994.



Prior to August 1994, Marquez had not joined SAG. Her resume, however, did state that she was "SAG eligible." A casting agent at Dixon Walker who helped conduct the auditions for "Medicine Ball," Deedra Ricketts, understood the phrase "SAG eligible" to mean that an applicant promises to "join the union or make compliances with the union the next time [he or she] work[s] on a union show." p. 82, Ricketts Depo. Scott Thompson, one of Marquez's agents, explained that a performer puts the phrase "SAG eligible" on his or her resume to "hopefully, increase [her] chances of securing work." pp. 24, 79, Thompson Depo.

Marquez had performed in a motion picture in 1989. A SAG collective bargaining agreement was in place for that project. Marquez's employment in that motion picture continued for over one calendar month.

On August 31, 1994, Ricketts of Dixon Walker Casting called Station 12 of SAG (an office of SAG) to check the status of all of the performers being considered for the episode of "Medicine Ball." Ricketts was informed that Marquez was a "must-pay," i.e. that the CBA required her to pay the equivalent of uniform union dues and fees. pp. 48-49, 83-84, Ricketts Depo. During her deposition testimony, Ricketts clearly affirmed that she recollected being told that Marquez was a "must-pay," as opposed to a "must-join" applicant. In addition, the typed phone logs indicate that Ricketts was told by SAG Station 12 that Marquez was a "must-pay." pp. 48-49, Ricketts Depo. Additionally, written confirmation given by Station 12 to Ricketts noted Marquez as "MUSTPY." Ricketts testified that she understood this was an abbreviation for "must-pay."

That same day Ricketts spoke with Station 12, she called Thompson of TMT and informed him that Marquez was a "must-pay" because of her previous motion picture industry work. Id. at 48. Marquez understood that she would need to pay the amount required under the CBA prior to the scheduled date of

the performance. p. 49, Persons Depo., pp. 29-32 Marquez. Depo.

Scott Thompson indicated at his deposition that he was told by Ricketts that Marquez was a "must-join" but also testified that his "understanding was that 'must-join' meant paying the required financial obligation." p. 30, Thompson Depo. Thompson testified that he was not aware of other aspects of what "must-join" or "must-pay" would mean. Id.

Marquez called SAG's office in Seattle, and asked about the cost of joining the Union. She did not relay any information about her particular situation. This was Marquez's sole personal contact with SAG. She testified at her deposition that the SAG representative did not misrepresent any facts nor did he treat her in a hostile manner. pp. 56-58, Marquez Depo. Marquez then called her agent Fuhriman, and told her she would not be able to accept the part offered her because she did not have sufficient funds to pay the SAG fees. p. 29, Marquez Depo. Fuhriman replied that perhaps something could be arranged with the Union. Id. at 29-30.

Fuhriman contacted the SAG office in Seattle to discuss the issue. Without mentioning Marquez by name, Fuhriman spoke to a SAG representative about the dues required of a Washington actor, p. 32, Fuhriman Depo., and the "possibility of working something out so Ms. Marquez would pay the dues and fees that were required . . . " Id. at 88.

Based upon a referral by Fuhriman, Marquez contacted the National Right to Work Foundation and spoke with an attorney



there named Hugh Reilly.[1] After speaking with Fuhriman and Marquez, Reilly drafted a letter to Dixon Walker Casting, which he circulated to TMT and Marquez on September 2, 1994. p. 57, Fuhriman Depo.; p. 24, Thompson Depo. The letter stated that "labor agreements Dixon-Walker and/or Lakeside have preclude [Marquez] from fulfilling the engagement unless she joins and pays dues or initiation fees to the union." On September 6, 1994, two days before the scheduled performance, Reilly mailed the same letter to Heidi Walker of Dixon Walker Casting and sent a copy to Lakeside Productions. The letter was never sent to SAG by Marquez, Reilly, or any other representative of Marquez.

Lakeside received Reilly's letter late on September 6, 1994 and the following day faxed a copy of it to Vicki Shapiro at the SAG office. Shapiro's assistant called her at a meeting the afternoon of September 7 to inform her of the issue. This was the first that Shapiro learned of Marquez's situation. The following day, September 8, 1994, Shapiro faxed a letter to Lakeside Productions, stating that SAG had no objection to the employment of Marquez in "Medicine Ball."

At no point has Marquez or any of her representatives filed a grievance against Lakeside. p. 53, Marquez Depo. Marquez has never requested that SAG file a grievance on her behalf, nor has she requested that SAG investigate whether a grievance should be filed against Lakeside. Id.

Marquez alleges that SAG breached its duty of fair representation to her. Specifically, Marquez alleges that SAG's union security clause was unlawful and that SAG breached its duty of fair representation by unlawfully maintaining and enforcing the

---

[1] The National Right to Work Foundation is described in Marquez's brief as an organization that "provides free legal assistance to workers subjected to compulsory unionism provisions." p. 2, Plaintiff's Brief in Support of Summ. Judg.

union security clause. In addition, Marquez alleges that SAG and Lakeside breached the CBA by applying the union security provision to her. Finally, Marquez alleges monetary damages totaling $555.00.

## II. DISCUSSION

### A. Summary Judgment Standard

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assn., 809 F.2d 626, 630-31 (9th Cir. 1987); Lew v. Kona Hospital, 754 F.2d 1420, 1423 (9th Cir. 1985). A genuine issue of material fact is one where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Summary judgment is also appropriate if the nonmoving party has the burden of proof at trial on an element essential to its case, and the nonmoving party fails to make a showing sufficient to establish a genuine dispute of fact as to the existence of that element. California Architectural Bldg. Prod. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

For a nonmoving party to withstand a summary judgment motion, it must show that there are genuine issues of material fact that can only be resolved by a finder of fact because they may reasonably be resolved in favor of either party. Id.



### B. Marquez's Breach of the Duty of Fair Representation Claims

#### 1. SAG's Alleged Breach of the Duty of Fair Representation By Entering into and Maintaining the CBA with Lakeside

Marquez alleges that SAG breached its duty of fair representation "by arbitrarily and in bad faith negotiating" the CBA entered into between SAG and Lakeside.

A union breaches its duty of fair representation when its conduct toward a member[2] is "arbitrary, discriminatory, or in bad faith." Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991); Vaca v. Sipes, 386 U.S. 171, 190 (1967). Allegations of "mere negligence . . . would not state a claim for breach of the duty of fair representation, . . ." United Steelworkers v. Rawson, 495 U.S. 362, 372-73. Bad faith can be established by showing that the union's actions were "sufficiently egregious or so intentionally misleading [as] to be invidious." O'Neill v. Air Line Pilots Ass'n, 939 F.2d 1199, 1203 (5th Cir. 1991) (internal quotations omitted).

Section 8(a)(3) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 158(a)(3), permits an employer and the employees' bargaining representative (i.e., the Union) to enter into an agreement requiring employees in the bargaining unit to pay union dues and initiation fees, whether or not the employees wish to become full union members. IUE v. NLRB, (Paramax Systems), 41 F.3d 1532, 1534 (D.C. Cir. 1994).

Section 8(a)(3) reads as follows:

> [It shall be an unfair labor practice for an employer—]

---

[2] The parties do not dispute that the duty of fair representation extends to Marquez, a job applicant.

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining until covered by such agreement when made, . . .

29 U.S.C. § 158(a)(3) (emphasis added).

The Supreme Court has determined that the Section 8(a)(3) "membership" which may be required of an employee has been "whittled down to its financial core," NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963), and does not require employees "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." Communications Workers v. Beck, 487 U.S. 735, 745 (1988).

As the D.C. Circuit Court of Appeals held in relation to a similar union security clause, "so long as a union does not attempt to enforce the agreement [the CBA] beyond its lawful requirement that employees pay only uniform initiation fees and dues, [such union-security] agreements are perfectly lawful under Section 8(a)(3)." Paramax Systems, 41 F.3d at 1538.

Marquez's allegations do not create any material dispute of fact sufficient to withstand summary judgment on this issue. Although Marquez argues that there is a dispute as to what her



agents were told by SAG officials,[3] the court finds that she has "fail[ed] to make a showing sufficient to establish a genuine dispute of fact as to the existence of" those facts, California Architectural Bldg. Prod. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), and that the issues surrounding what her agents were told cannot "reasonably be resolved in favor of [plaintiff]." Id., at 1468. The court finds that no reasonable trier of fact could find that SAG "attempt[ed] to enforce the agreement [the CBA] beyond its lawful requirement that employees pay only uniform initiation fees and dues . . ." Paramax Systems, 41 F.3d at 1538.[4] Therefore, SAG is entitled to summary judgment on this claim.

2. SAG's Alleged Breach of the Duty of Fair Representation By its Application of the 30-Day Grace Period Provision

Marquez also alleges that SAG breached the duty of fair representation to her because SAG allegedly unlawfully enforced the 30-day grace period provision of the union security clause.[5]

---

[3] Marquez argues that her agents may have been told by SAG that Marquez was a "must-join" as opposed to a "must-pay" applicant. However, Marquez's representatives' own testimony refutes this.

[4] The court declines to follow Bloom v. N.L.R.B., 30 F.3d 1001 (8th Cir. 1994), an unfair labor practice case decided prior to the D.C. Circuit court's ruling in Paramax Systems. In contrast to this case, the Bloom court found that the union security clause in Bloom had been "unlawfully interpreted and applied" in the context of an unfair labor practice allegation questioning the approval of a settlement between the union and the employer.

[5] As noted above, the union security provision contained a provision stating that it would not apply

> until on or after the thirtieth day following the beginning of . . . employment . . . and the Producers shall interpret this sentence to mean that membership in the Union cannot be required of any

Although Marquez characterizes this claim as a breach of the duty of fair representation, it is actually a claim that the union security clause 30-day provision violates § 8(a)(3) of the NLRA. The Supreme Court has held that "[i]t is essential to the administration of the [National Labor Relations] Act that these determinations (of what activities are protected by § 7, or constitute unfair labor practices under § 8 of the NLRA) be left in the first instance to the National Labor Relations Board." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959). "[W]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [Board] if the danger of state interference is to be averted." Id. at 245.

Because Marquez's claim actually alleges a violation of § 8(a)(3), and therefore is actually an unfair labor practice claim, it is preempted by the exclusive jurisdiction of the National Labor Relations Board. As the Supreme Court has stated, it "is the conduct being regulated, not the formal description of governing legal standards, that is the focus of concern." Motor Coach Employees v. Lockridge, 403 U.S. 274, 292 (1971). The court will not exercise jurisdiction over Marquez's claim about the 30-day grace period as this claim is subject to the exclusive jurisdiction of the National Labor Relations Board. Therefore, SAG is entitled to summary judgment on this claim as well.

C. Marquez's Breach of the CBA Claims

In addition to her duty of fair representation claims, Marquez alleges that SAG and Lakeside breached the CBA by applying the union security provision to her. The court finds that Marquez's

---

performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry; . . .

Subpart B, CBA.



breach of contract claims must be dismissed for two reasons. First, this claim asserts that the CBA is violative of the NLRA because it allegedly imposes obligations upon employees in excess of that which may be required under the NLRA. Again, Marquez is couching her § 8(a)(3) violation allegations in other terms, but this will not save the claim from preemption.

Second, Marquez has utterly failed to exhaust her contract remedies. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965) ("As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union as the mode of redress.") (footnote omitted). Marquez did not file a grievance with either SAG or Lakeside. In addition, she never requested that SAG pursue a grievance on her behalf, or that SAG investigate whether a grievance should be filed. Finally, Marquez does not dispute that she never complained to SAG directly, failing even to send the September 6, 1994 letter to SAG. With respect to all but Marquez's requests for injunctive relief, the grievance resolution procedure in the CBA should have been exhausted prior to bringing the breach of contract claims. Additionally, Marquez failed to "afford the union the opportunity to act on [her] behalf," id., by requesting investigation into the propriety of filing a grievance. She will therefore not be permitted to claim a contractual violation at this point. Finally, the court rejects Marquez's assertions that her last-minute letter sent only to Lakeside excuses her obligations to exhaust contractual remedies. Therefore, SAG and Lakeside are entitled to summary judgment on Marquez's breach of contract claims.

D. Marquez's Motion to Reopen Discovery

Marquez has requested leave to reopen discovery to depose a SAG Station 12 clerk. The discovery deadline in this matter was December 18, 1995. On December 13, 1995, plaintiff's

counsel was made aware of the name of the Station 12 clerk, Sam McFarland, who Marquez now wishes to depose.[6] Marquez did not seek permission to reopen discovery until March 12, 1996. The court hereby DENIES Marquez's untimely request to reopen discovery in this matter.

## III. CONCLUSION

Based on the foregoing, the court finds and rules that defendants' motions for summary judgment are GRANTED and plaintiff's motion for summary judgment is DENIED, as follows:

1) The court GRANTS defendant SAG's motion for summary judgment with respect to Marquez's first cause of action claiming a breach of the duty of fair representation by entering into and maintaining the CBA with Lakeside;

2) The court GRANTS defendant SAG's motion for summary judgment with respect to Marquez's first cause of action claiming a breach of the duty of fair representation by SAG's application of the 30-day grace period provision, finding this claim subject to the exclusive jurisdiction of the National Labor Relations Board;

3) The court GRANTS defendant SAG and defendant Lakeside's motions for summary judgment with respect to Marquez's second cause of action claiming a breach of the CBA, finding this claim subject to the exclusive jurisdiction of the National Labor Relations Board and additionally finding that Marquez failed to exhaust her administrative remedies.

---

[6] Defendants note that plaintiff was made aware of McFarland's name as early as October 24, 1995 when the parties jointly identified Deposition Exhibit 5.



4) Plaintiff's request to reopen discovery in this matter is DENIED.

DATED at Seattle, Washington this 16th day of April, 1996.

/s/
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

## APPENDIX C

---

**NATIONAL LABOR RELATIONS ACT,**
**§§ 8(a)(3) and 8(b)(2),**
**29 U.S.C. §§ 158(a)(3), and 158(b)(2)**

---

**NATIONAL LABOR RELATIONS ACT,**
**§§ 8(a)(3) and 8(b)(2),**
**29 U.S.C. §§ 158(a)(3), and 158(b)(2)**

**§ 158. Unfair labor practices**

**(a) Unfair labor practices for an employer**

It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made . . . : *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

**(b) Unfair labor practices by labor organization**

It shall be an unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section . . . .